Montana Water Court PO Box 1389 Bozeman, MT 59771-1389 1-800-624-3270 (406) 586-4364 watercourt@mt.gov FILED
04/20/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
43B-0717-R-2022
Lambert, Kathryn
6.00

MONTANA WATER COURT, YELLOWSTONE DIVISION YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN BASIN 43B PRELIMINARY DECREE

CLAIMANTS: Deborah M. Arlian; Gary L. Arlian; Daniel L. Sanders; Tami M. Sanders; Darlene M. Arlian; Marvin R. Arlian

NOTICE OF INTENT TO APPEAR: Tami M. Sanders

CASE 43B-0717-R-2022

43B 10347-00

43B 179981-00

43B 179985-00

43B 179986-00

43B 183217-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Claim 43B 10347-00 appeared in the Preliminary Decree with the following issue remark:

THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE HEADGATE CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

Tami M. Sanders filed a notice of intent to appear.

Claims 43B 179981-00 and 43B 179985-00 each appeared in the Preliminary Decree with the following remarks:

AN AMENDMENT WAS SUBMITTED ON 02/28/2018 REQUESTING TO AMEND THE PLACE OF USE. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED BY THE COURT AFTER THE ISSUANCE OF THE PRELIMINARY DECREE. PLACE OF USE

AN AMENDMENT WAS SUBMITTED ON 02/28/2018 REQUESTING TO AMEND THE POINT OF DIVERSION. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

Claim 43B 179986-00 appeared in the Preliminary Decree with the following remark:

AN AMENDMENT WAS SUBMITTED ON 02/28/2018 REQUESTING TO AMEND THE PLACE OF USE. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED BY THE COURT AFTER THE ISSUANCE OF THE PRELIMINARY DECREE. PLACE OF USE

Claim 43B 183217-00 appeared in the Preliminary Decree with the following issue remark:

THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE SPRING CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

The issue remarks were not addressed through the objection process. The Water Court is required to resolve the issues raised by each issue remark. Section 85-2-248, MCA. Under Section 85-2-248(3), MCA, information in the claim file or other information obtained by the Court can be reviewed to determine if it provides a sufficient basis to resolve the issue raised by a remark and the Court can provide the claimants an opportunity to file additional information or evidence. On January 19, 2023 the parties filed statements, marked aerial photographs, and a withdrawal of the notice of intent to appear. This includes a motion to amend the point of diversion for claim 43B 179986-00 pursuant to section 85-2-233(6), MCA. The April 3, 2023 Order Setting Filing Deadline requested some clarification. On April 14, 2023 a Corrected Withdrawal Of Notice Of Intent To Appear was filed by the parties providing the clarification. The settlement is viewable in the Court's FullCourt Enterprise case management system.

APPLICABLE LAW

"All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section." Section 85-2-248(2), MCA.

The Montana Water Court has jurisdiction to review a motion to amend pursuant to

section 85-2-233(6), MCA.

Rule 15 M.R.Civ.P. restricts the scope of the amendments to the conduct, transaction, or occurrence set forth in the original pleading or, in other words, the "same set of operative facts as contained in the original pleading." *Sooy v. Petrolane Steel Gas, Inc.*, 218 Mont. 418, 422-423 (1985). The requested amendment "merely makes more specific that which has already been alleged." *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15 (1972).

Notice must be published by newspaper if the requested amendments "may adversely affect other water rights." Section 85-2-233(6)(a)(i), MCA.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

- 1. For claim 43B 10347-00, the Preliminary Decree states that the point of diversion legal description is the NENESE section 13, T2N, R14E, SWEET GRASS. The point of diversion legal description should be the SESENE section 13, T2N, R14E, SWEET GRASS. The point of diversion issue remark should be removed as addressed and resolved.
- 2. For livestock direct from source claim 43B 179981-00, the Preliminary Decree states that the point of diversion and place of use are the NWSESW section 35, T1N, R15E, SWEET GRASS. The settlement states that this does not include the entire length of the spring creek from which the stock water. The point of diversion and place of use should be:

QTRSEC	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	COUNTY
W2SESW	35	1N	15E	SWEET GRASS
NESESW	35	1N	15E	SWEET GRASS
SESWSW	35	1N	15E	SWEET GRASS
NWSWSE	35	1N	15E	SWEET GRASS

The notice remarks concerning the amendments should be removed as having served their notice purposes.

3. For livestock direct from source claim 43B 179985-00, the Preliminary Decree states

that the point of diversion is the SESESW section 35, T1N, R15E, SWEET GRASS, and the place of use is the SESENW section 35, T1N, R15E, SWEET GRASS. The settlement states that these descriptions are incorrect and incomplete. The point of diversion and place of use should be:

QTRSEC	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
SWNESW	35	1N	15E	SWEET GRASS
NESESW	35	1N	15E	SWEET GRASS
NWSWSE	35	1N	15E	SWEET GRASS

The notice remarks concerning the amendments should be removed as having served their notice purposes.

- 4. The changes to the point of diversion for claim 43B 179986-00 requested in the motion to amend arise out of the same conduct, transaction, or occurrence specified on the original Statement of Claim, are based on the same operative facts specified in the Statement of Claim, and merely make more specific that which was already claimed on the original Statement of Claim.
- 5. For livestock direct from source claim 43B 179986-00, the Preliminary Decree states that the point of diversion is the SENESW section 35, T1N, R15E, SWEET GRASS, and the place of use is the SENESW section 3, T1N, R15E, SWEET GRASS. The settlement states that these descriptions are incorrect and incomplete. The point of diversion and place of use should be:

QTRSEC	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
S2NESW	35	1N	15E	SWEET GRASS
NESESW	35	1N	15E	SWEET GRASS
NWSWSE	35	1N	15E	SWEET GRASS

The notice remark concerning the place of use amendment should be removed as having served its notice purpose.

6. For livestock direct from source claim 43B 183217-00, the Preliminary Decree states that the point of diversion and place of use are the SWNWSE section 13, T1N, R14E, SWEET GRASS. The settlement states that this description is incomplete. The point of diversion and place of use should be:

QTRSEC	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	COUNTY
SWNWSE	13	1N	14E	SWEET GRASS
NENWSE	13	1N	14E	SWEET GRASS
NWNWSE	13	1N	14E	SWEET GRASS

The point of diversion issue remark should be removed as addressed and resolved.

The Preliminary Decree also includes the following notice remark:

CLAIM WAS IMPROPERLY DESIGNATED TO BASIN 43BJ AND WAS INCLUDED IN THE TEMPORARY PRELIMINARY DECREE ISSUED 04/03/1985 . CLAIM WAS NOT INCLUDED IN THE BASIN 43B TEMPORARY PRELIMINARY DECREE ISSUED 01/16/1985.

This notice remark should be removed as having served its notice purpose.

CONCLUSIONS OF LAW

- 1. The requested amendment does not adversely affect other water rights as it is a correction to the abstract which does not make any change to the actual historical use of the claimed right on the ground. Notice by publication of this amendment is not required. Section 85-2-233(6), MCA.
- 2. The requested amendment "merely makes more specific that which has already been alleged." *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15 (1972).
- 3. The motion to amend and the settlement documentation filed by the parties are sufficient to contradict and overcome the prima facie claims as they appeared in the Preliminary Decree and to resolve the issue remarks without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

RECOMMENDATIONS

Based upon the above, this Master recommends that the Court grant the motions to amend claims 43B 179981-00, 43B 179985-00, and 43B 179986-00 and make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim for each claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service via USPS Mail:

Deborah M. Arlian Gary L. Arlian 160 Highway 191 Big Timber, MT 59011-7701 (406) 932-4207 W

Daniel L. Sanders Tami M. Sanders 503 Highway 10 E Big Timber, MT 59011-8043 605-214-8617 H tamiarlian@yahoo.com

Darlene M. Arlian Marvin R. Arlian PO Box 1171 Big Timber, MT 59011 406-932-4506 W

ABSTRACT OF WATER RIGHT CLAIM

YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK BASIN 43B

Water Right Number: 43B 10347-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: DEBORAH M ARLIAN

160 HIGHWAY 191

BIG TIMBER, MT 59011 7701

GARY L ARLIAN 160 HIGHWAY 191

BIG TIMBER, MT 59011 7701

Priority Date: OCTOBER 3, 1898

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 134.70 GPM ***Volume:** 54.00 AC-FT

THE WATER COURT HAS DETERMINED THAT A VOLUME QUANTIFICATION IS

REQUIRED TO ADEQUATELY ADMINISTER THIS RIGHT

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 8.00

Source Name: NORTH FORK SEVENMILE CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u> <u>Govt Lot</u> <u>Qtr Sec</u> <u>Sec</u> <u>Twp</u> <u>Rge</u> <u>County</u>

1 SESENE 13 2N 14E SWEET GRASS

Period of Diversion: APRIL 1 TO NOVEMBER 30

Diversion Means: HEADGATE

Period of Use: APRIL 1 TO NOVEMBER 30

<u>ID</u>		<u>Acres</u>	Govt Lot	<u> Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	County
1		2.00		SWNWSW	18	2N	15E	SWEET GRASS
2		6.00		NWSWSW	18	2N	15E	SWEET GRASS
	Total:	8.00						

ABSTRACT OF WATER RIGHT CLAIM

YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK BASIN 43B

Water Right Number: 43B 179981-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: DANIEL L SANDERS

503 HIGHWAY 10 E

BIG TIMBER, MT 59011 8043

DEBORAH M ARLIAN 160 HIGHWAY 191

BIG TIMBER, MT 59011 7701

GARY L ARLIAN 160 HIGHWAY 191

BIG TIMBER, MT 59011 7701

TAMI M SANDERS 503 HIGHWAY 10 E

BIG TIMBER, MT 59011 8043

Priority Date: DECEMBER 31, 1930

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS

OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY

TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR

STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND

HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: SPRING, UNNAMED TRIBUTARY OF YELLOWSTONE RIVER

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

<u>ID</u> 1	Govt Lot	<u>Qtr Sec</u> W2SESW	<u>Sec</u> 35	<u>Twp</u> 1N	<u>Rge</u> 15E	<u>County</u> SWEET GRASS
Period of Diversion:	JANUARY 1 TO I	DECEMBER 31				
Diversion Means:	LIVESTOCK DIR	ECT FROM SO	URCE			
2		NESESW	35	1N	15E	SWEET GRASS
Period of Diversion:	JANUARY 1 TO I	DECEMBER 31				
Diversion Means:	LIVESTOCK DIR	ECT FROM SO	URCE			
3		SESWSW	35	1N	15E	SWEET GRASS
Period of Diversion:	JANUARY 1 TO I	DECEMBER 31				
Diversion Means:	LIVESTOCK DIR	ECT FROM SO	URCE			

4 NWSWSE 35 1N 15E SWEET GRASS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: JANUARY 1 TO DECEMBER 31

<u>ID</u>	<u>Acres</u>	Govt Lot	Qtr Sec	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	County
1			W2SESW	35	1N	15E	SWEET GRASS
2			NESESW	35	1N	15E	SWEET GRASS
3			SESWSW	35	1N	15E	SWEET GRASS
4			NWSWSE	35	1N	15E	SWEET GRASS

ABSTRACT OF WATER RIGHT CLAIM

YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK BASIN 43B

Water Right Number: 43B 179985-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: DANIEL L SANDERS

503 HIGHWAY 10 E

BIG TIMBER, MT 59011 8043

DEBORAH M ARLIAN 160 HIGHWAY 191

BIG TIMBER, MT 59011 7701

GARY L ARLIAN 160 HIGHWAY 191

BIG TIMBER, MT 59011 7701

TAMI M SANDERS 503 HIGHWAY 10 E

BIG TIMBER, MT 59011 8043

Priority Date: DECEMBER 31, 1930

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS

OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY

TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR

STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND

HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: SPRING, UNNAMED TRIBUTARY OF YELLOWSTONE RIVER

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

<u>ID</u>	Govt Lot	Qtr Sec	<u>Sec</u>	<u>Twp</u>	Rge	County
1		SWNESW	35	1N	15E	SWEET GRASS
Period of Diversion:	JANUARY 1 TO I	DECEMBER 31				
Diversion Means:	LIVESTOCK DIR	ECT FROM SO	URCE			
2		NESESW	35	1N	15E	SWEET GRASS
Period of Diversion:	JANUARY 1 TO I	DECEMBER 31				
Diversion Means:	LIVESTOCK DIR	ECT FROM SO	URCE			
3		NWSWSE	35	1N	15E	SWEET GRASS
Period of Diversion:	JANUARY 1 TO I	DECEMBER 31				
Diversion Means:	LIVESTOCK DIR	ECT FROM SO	URCE			

Period of Use: JANUARY 1 TO DECEMBER 31

$\overline{\mathbf{D}}$	<u>Acres</u>	Govt Lot	Qtr Sec	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	County
1			SWNESW	35	1N	15E	SWEET GRASS
2			NESESW	35	1N	15E	SWEET GRASS
3			NWSWSE	35	1N	15E	SWEET GRASS

ABSTRACT OF WATER RIGHT CLAIM

YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK BASIN 43B

Water Right Number: 43B 179986-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: DANIEL L SANDERS

503 HIGHWAY 10 E

BIG TIMBER, MT 59011 8043

DEBORAH M ARLIAN 160 HIGHWAY 191

BIG TIMBER, MT 59011 7701

GARY L ARLIAN 160 HIGHWAY 191

BIG TIMBER, MT 59011 7701

TAMI M SANDERS 503 HIGHWAY 10 E

BIG TIMBER, MT 59011 8043

Priority Date: DECEMBER 31, 1930

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS

OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY

TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR

STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND

HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: SPRING, UNNAMED TRIBUTARY OF YELLOWSTONE RIVER

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

Diversion Means:

<u>ID</u>	Govt Lot	Qtr Sec	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		S2NESW	35	1N	15E	SWEET GRASS
Period of Diversion:	JANUARY 1 TO D	ECEMBER 31				
Diversion Means:	LIVESTOCK DIRE	ECT FROM SO	URCE			
2		NESESW	35	1N	15E	SWEET GRASS
Period of Diversion:	JANUARY 1 TO D	ECEMBER 31				
Diversion Means:	LIVESTOCK DIRE	CT FROM SO	URCE			
3		NWSWSE	35	1N	15E	SWEET GRASS
Period of Diversion:	JANUARY 1 TO D	ECEMBER 31				

LIVESTOCK DIRECT FROM SOURCE

Period of Use: JANUARY 1 TO DECEMBER 31

$\underline{\mathbf{ID}}$	<u>Acres</u>	Govt Lot	Qtr Sec	Sec	<u>Twp</u>	<u>Rge</u>	County
1			S2NESW	35	1N	15E	SWEET GRASS
2			NESESW	35	1N	15E	SWEET GRASS
3			NWSWSE	35	1N	15E	SWEET GRASS

ABSTRACT OF WATER RIGHT CLAIM

YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK BASIN 43B

Water Right Number: 43B 183217-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: MARVIN R ARLIAN

PO BOX 1171

BIG TIMBER, MT 59011

DARLENE M ARLIAN

PO BOX 1171

BIG TIMBER, MT 59011

Priority Date: JUNE 1, 1950

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS

OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM.
THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY

TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR

STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND

HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: SPRING, UNNAMED TRIBUTARY OF BOULDER RIVER

Source Type: GROUNDWATER

ALSO KNOWN AS GODFREY NO. 1 SPRING

Point of Diversion and Means of Diversion:

<u>ID</u>	Govt Lot	Qtr Sec	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	County
1		SWNWSE	13	1N	14E	SWEET GRASS
Period of Diversion:	JANUARY 1 TO	DECEMBER 31				
Diversion Means:	LIVESTOCK DIF	RECT FROM SO	URCE			
2		NENWSE	13	1N	14E	SWEET GRASS
Period of Diversion:	JANUARY 1 TO	DECEMBER 31				
Diversion Means:	LIVESTOCK DIF	RECT FROM SO	URCE			
3		NWNWSE	13	1N	14E	SWEET GRASS
Period of Diversion:	JANUARY 1 TO	DECEMBER 31				
Diversion Means:	LIVESTOCK DIF	RECT FROM SO	URCE			
Period of Use:	JANUARY 1 TO	DECEMBER 31				

<u>ID</u>	<u>Acres</u>	Govt Lot	<u> Qtr Sec</u>	<u>Sec</u>	$\underline{\mathbf{Twp}}$	<u>Rge</u>	County
1			SWNWSE	13	1N	14E	SWEET GRASS
2			NENWSE	13	1N	14E	SWEET GRASS
3			NWNWSE	13	1N	14E	SWEET GRASS